Supreme Court, U.S.
FILED
MAR 5 - 2005
OFFICE OF THE CLERK

No. 041349

IN THE

SUPREME COURT OF THE UNITED STATES

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MARTIN ESQUIBES
*Petitioner*

v.

ALBERTO GONZALES ATTORNEY GENERAL
Respondent

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**On Petition for A Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

USCA NO.: 04-73103
Agency No.: A76-369-144

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S PETITION FOR REVIEW?

## LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

## OPINIONS BELOW

{X} For cases from Federal Courts

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is

{X} is unpublished.

[X] For cases from federal court

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 15, 2004, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254

## CONSTITUTIONAL AND STATUATORPROVISIONS INVOLVED


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## STATEMENT OF THE CASE

Petitioner is a thirty-seven year old male, who is a native and citizen of Mexico. He entered the United States on March 20, 1987. Petitioner was subsequently placed in immigration proceedings and became subject to removal. Petitioner requested relief in the form of cancellation of removal for non-permanent residents pursuant to INA Section 240 A (1)(b).

The Immigration Judge found that the Petitioners met the requirements of continuous physical presence and good moral character. The Immigration Judge determined however that the Petitioner did not meet the standard of hardship required for granting of the waiver and permitting Cancellation of Removal.

The decision of the Immigration Judge was then appealed to the Board of Immigration Appeals on October 24, 2002. On May 20, 2004, the Board of Immigration Appeals affirmed the decision of the Immigration Judge without opinion.

Petitioner then filed a Petition For Review and Stay of Deportation with the Ninth Circuit Court of Appeal on June 21, 2004.

The Ninth Circuit Court of Appeals denied Petitioner's Motion on December 15, 2004.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

**THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW**

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-

examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioner sought due process by asking for a Stay of Removal pending a review of the merits of his case. Petitioner asserts that due process entitled him to a Stay of Deportation and a fair hearing on the issues of entitlement to relief from deportation. Denial of review in this instance served no equitable purpose and served to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities and hardships that he would face if he were deported to Mexico.

The case of Romero-Morales v. INS, 25 F. 3d 125, 129 (9th Cir. 1994), established that the BIA is required to consider the record as a whole and to review all relevant evidence when deciding a motion to reopen.

Furthermore it is clear that the Petitioner in this matter has had his due process violated, in that the BIA dismissed the Petitioner's appeal. This dismissal shows that the BIA failed to make more than even a cursory review which amounts to colorable due process in this context. Larita-Martinez v. INS, 220 F. 3d 1092, 1095-96 (9th Cir. 2000).

Petitions for Review such as the one made by the Petitioner are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F. 2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated, "The petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor."

The case of Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992) states that, "These standards represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified."

In the case of Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, (1988), the court held that an order by a federal court that relates only to the conduct or progress of litigation by the court ordinarily is not considered an injunction, and therefore is not appealable. However the Supreme Court went on to hold that it will continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious and perhaps irreparable consequences

Prior to the enactment of the Illegal Immigration Reform Act. the filing of a Petition For Review automatically stayed a petitioner's deportation pending appellate review in most cases. This has been well stated in the case of De Leon v. INS, 115 F 3d 643, 644, (9th Cir. 1997).

The institution of IIRIRA, 1n 1996, brought immense change to the court's jurisdiction to review final deportation and exclusion orders. The new law established permanent rules that apply to removal proceedings that were initiated against aliens on or after April 1, 1997. As part of the changes made to the petition for review process, IIRIRA eliminated the automatic stay provisions and replaced it with provisions similar to the stay provisions applicable to aliens convicted of an aggravated felony under the old INA. These changes were upheld in the case of Kalaw v. INS, 133 F 3d 1147, 1149 (9th Cir. 1997).

Although the old immigration law provided for an automatic stay when a petition was filed for review, some cases were considered exceptions. Under former INA Section 1252 (f) (2), stays were not automatic in the case of removal proceedings against convicted felons. In Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992), a case involving an aggravated felon, it was stated that aliens convicted of an "aggravated felony," within the definition of the INA, were not automatically entitled to a stay of deportation pending their appeal. For these aliens the court had the discretion to grant a request for a stay of deportation, after evaluating the stay request under the same standards that were applied in the district courts in evaluating a preliminary injunction.

During the evolution of the Immigration and Nationality Act, the case of Artukovoc v. Rison, 784 F 2d

1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

It has now been clearly established that 8 U.S.C. Section 1252 (f) (2) applies to the grant of a temporary stay for an alien once a decision of removal has been ordered. Maldonado v. Fasno, 67 F. Supp. 2d 1170, 1175. 1175 (S.D.Cal. 1999). Under Section 1252 (f) (2) it is stated that; " A final order for removal cannot be stayed "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The terms "clear and convincing," have been held as an intermediate standard, not as high as that of proof "beyond a reasonable doubt," but higher than a "preponderance of evidence." United States v. Meza-Soria, 935 F. 2d. 166, 169, (9th Cir. 1991).

With respect to factual challenges, Section 1252 (f) (2) requires that the alien establish that the order or removal was "manifestly contrary to law." In Dickinson v. Zurko, 527 U.S. 150, 155 (1999), "manifest" was described as something that is apparent, obvious, clear, or undisputable.

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's stay, and the denial of his appeal to the 9th Circuit because there is a high probability that he can prevail on the merits of his claim. Petitioner can also demonstrate that his two American citizen children will suffer irreparable harm if they are removed from the United States.

## REASONS FOR GRANTING THE WRIT

### 1. The Court of Appeal Erred In Upholding The Immigration Judge's Decision That Petitioner's Removal Would Not Cause Undue Hardship To His American-Citizen Children

The United States Code Section 1254 (a) (1) provides that the Attorney General may cancel the deportation of an alien where such alien: "Is deportable under any law of the United States...; has been physically present in the United States for a continuous period of ten years immediately preceding the date of such application, and proves that during all of such period he was, and is, a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to his spouse, parent or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence."

The Act also states that the person applying for relief must be of good moral character, both statutorily, and in the exercise of discretion. The Petitioner has never been arrested or convicted of a crime as evidenced by his own testimony and documentary evidence or record. The Immigration Judge found that the Petitioners met the requirements of good moral character, in addition to meeting the ten year time requirement for physical presence in the United States.

In the case at hand the Petitioner and his wife have established eighteen years of continuous presence in the United States in compliance with INA Section 244 (b) (2). Petitioner and his wife have two U.S. citizen children,

Francisco Esquibes, age ten, and Dani Esquibes, age four. The Petitioners have continuously resided in Los Angeles, California. They currently reside in a house that they are purchasing. Petitioner has worked for the same employer for the past eleven years as a machine shop operator. His wife works with him.

The Petitioner's children have extensive ties in the United States. The Petitioner's oldest son, Francisco, is in the fifth grade and speaks English. He attends school with his eight cousins, all of whom are United States citizens. After school he is taken care of by his grandmother who is also a United States citizen. Petitioner's children see their cousins, aunts, uncles, and grandmother on a daily basis.

It is the Petitioner's contention that the 9th Circuit Court of Appeals erred in supporting the Immigration Judge's finding that the Petitioners did not establish that his children would suffer extreme hardship as required by the Act if he were removed from the United States.

Many factors must be taken into consideration in making a determination of extreme hardship. All factual data and relevant facts presented must be completely analyzed.

"Failure to consider any of the facts presented constitutes an abuse of discretion" "In making its determination, the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and

immigration history. "In making this determination, relevant factors though not determinative in themselves, must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

In the Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), The Board concluded that the Respondent in that case did establish "exceptional and unusual hardship. Herein the Respondent was a 39-year-old single mother of four U.S. citizen children. ages 12, 11, 18, and 5, and two minor respondents, ages 15, and 16. The Respondent in that instance had no close relatives in Mexico and her entire family lived in the United States. The Respondent was the sole support of her family and was self-employed. Additionally her children had spent their entire lives in the U.S. and did not speak Spanish.

The most significant factor about Recinas, is the fact that the Board stated that the "hardship standard was not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." The Board after engaging in a "cumulative analysis," found that the Lawful Permanent Resident parents of the Petitioner formed a "strong system of family support" which the children would lose if they were removed to Mexico.

Separation from family and children may be considered the most extreme form of hardship. Bastides v. Immigration and Naturalization Service. 609 F.2d 101 (1979), established that emotional issues must be considered factors in determining hardship. In that instance the court failed to recognize emotional hardship which would result from separation of the alien who expressed deep affection for his child, and who had been shown to have acted consistently with his expression of

affection. Therein insufficient consideration was given to non-economic hardship which would result from the alien's deportation. Thus remand was required in this case..

Historically the court has ruled that family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values that underlie our society. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Additionally the court in Urbano de Malaluan v. Immigration and Naturalization Service, 577 F. 2d 589 (9th Cir. 1978), reversed an order of the Board of Immigration Appeals denying a motion to reopen proceedings, emphasizing that the "separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

In Wang v. Immigration and Naturalization Service, 622 F.2d 1341 (1980), the court reasoned that the minor children of the Wangs , who have spent their whole lives in the United States, may suffer potential hardship if they were forced to leave this country. Accordingly the court held that the Board should not have summarily dismissed the Wang's claim of hardship to their children. It was held that the effect that the deportation of the parents would have on the Wang children should be determined only after a hearing.

In Ramirez-Gonzalea v. INS, 794 F. 2d 491 (9th Cir 1986), and in Carnalla-Munoz v. INS. 627, F 2d 1004 (9th Cir. 1980), the court recognized that "the most important single hardship factor may be the separation of the alien from the family living in the United States. It

was further held in Prapavat v. INS, 662 F. 2d 561, 563 (9th Cir. 1981), that "Family unity is always an important consideration, " and "Failing to consider the cumulative effect of all relevant factors in a case can also be found to be an abuse of discretion."

Additionally when the Court fails to consider the impact of separation of the parent from the child that can amount to an abuse of discretion on its part. Reyes-Melendrez v. INS, --F. 3d—2003 WL 22053448, (9th Cir.Sep. 4, 2003).

The 9th Circuit Court of Appeal erred and abused its discretion in the case at hand, in supporting the position of the BIA, that the evidence presented by the Petitioner did not support his argument that their removal would cause extreme hardship to their American citizen children. Petitioner showed through his testimony that these children would be affected emotionally and sustain damaging effects if Petitioner was removed and their family home was broken up.

The ages of the Petitioner's two children play an important part in determining whether they will suffer hardship and sustain damaging effects. Specifically, if the ages of these children make it difficult for them to adjust to life outside the United States, this factor will favor the petitioner's position. Matter of Andazola, 23 I&N Dec. 319, 320, (BIA 2002).

Herein the Petitioner's children are ten and four years of age. Their entire life has been spent in the United States. The older child, Francisco, through his school and community experience, is adapting to life in the United States. He speaks English and is now in the fifth grade. He has friends and participates in sports. He is at an age

where he would suffer harm if relocated to Mexico because he could not speak the language, is not familiar with the culture, and is too young to comprehend why his family relocated.

Another important factor for consideration is that familial support is based here in the United States. The children's aunts, uncles, grandmother and cousins reside in the United States. The children are extremely close to their grandmother who is a Lawful Permanent Resident, as she cares for them on a daily basis.

Moreover the children are attached to their eight U.S. citizen cousins and numerous aunts and uncles. Here it is clear that all of these individuals provide a strong emotional and psychological support base for Francisco, and Dani, Petitioner's children.

The case of Jara-Navarette v. INS, 813 F. 2d 1340, (9th Cir. 1986), strongly emphasized the point that the Court must examine every conceivable circumstance that may cause the United States citizen child of a respondent to suffer hardship due to his or her deportation. The Court stated, "In reviewing BIA decisions involving hardship to the United States citizen children, generalizing rather than individualized consideration and cursory treatment of individual circumstances constitute an abuse of discretion. Thus we have not hesitated to vacate denials of applications for suspension of deportation when the BIA abuses its discretion in examining hardship to United States citizen children." The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

Additionally courts in other than the Ninth circuit have been vigilant in ensuring that the BIA gives individualized consideration to United States citizen children. In Ramos

v. INS, 695 F. 2d 181 (5th Cir. 1983), the petitioners had two United States children, ages seven, and nine, at the time of the deportation hearing. The Court held that the BIA had not sufficiently examined how a child of a grammar school age might suffer from being uprooted from his life in the United States and remanded the case for further consideration.

The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

In this instance the 9th Circuit Court erred by supporting the immigration Judge's decision that removal of the Petitioner would not cause undue hardship to his children.

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any apply alien can fail to meet the requisite standard for hardship. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no

justification for rejection of evidence, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS,1999 WL 728521 (9th Cir. 1999) that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When the Board initially made a decision that the evidence presented was merely cumulative, it suggests that the Board failed to consider and evaluate the evidence in its entirety. This amounts to a failure of due process, raising an issue of a colorable constitutional claim. The Petitioner, his children, and their Lawful Permanent Resident, and citizen relatives, would suffer extreme emotional as well as financial hardship if Petitioner was forced to return to Mexico.

**2. The Court of Appeal Erred In Failing To Address The Fact That Petitioner's Case Was Not Reviewed By A Three Member Panel**

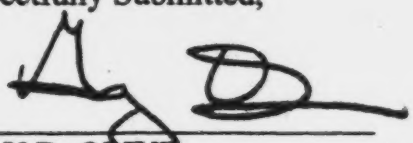
Under recent immigration reform regulations, 67 Fed. Reg. 54, 878, 54, 905 (August 26, 2002), the Petitioner was entitled to have her case reviewed by a Three Member Panel, because there is a need to establish precedent construing the meaning of the regulations, and the need to resolve a case or controversy of major national importance. This review was denied to her and the controversy over the meaning of the regulation applied in denying her case has yet to be resolved.

## CONCLUSION

Petitioner, through his counsel, contends that the Ninth Circuit Court of Appeals erred in denying his Petition for Review and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit his case to be reopened and remanded so that he can present his application for relief from removal before the Immigration Court.

Dated: February 14, 2005

Respectfully Submitted,



GARY D. OLIVE,
Attorney at Law

FILED
Dec 15 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| MARTIN ESQUIBES<br><br>Petitioner,<br><br>v.<br><br>JOHN ASHCROFT, Attorney General,<br><br>Respondent. | No. 04-73103<br><br>INS Nos.<br>A76-369-144<br><br>ORDER |

**Before: GOODWIN, ALARCON and TROTT,** Circuit Judges

Respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. Section 1252(a)(2)(B)(i); *Romero-Torres v. Ashcroft*, 327 F. 3d 887, 892, (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F. 3d 1137, 1144 (9th Cir. 2002). The temporary stay of removal and voluntary departure confirmed by Ninth Circuit General Order 6.4 (c) and *Desta v. Ashcroft*, 365 F. 3d 741 (9th Cir. 2004) shall continue in effect until issuance of the mandate. See also *Salvador-Calleros v. Ashcroft*, No. 71727, 2004 WL 2660604 (9th Cir. Nov. 23, 2004)

All other pending motions are denied as moot.

**DISMISSED**

**APPENDIX A**

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

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Date: May 20 2004

File: A76-369-144 Los Angeles

In re: ESQUIBES, MARTIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: ENRIQUE AREVALO

ORDER;

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. Section 1003, 1 (e) (4).

FURTHER ORDER: Pursuant to the Immigration Judge's Order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statue, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B (b) of the Immigration and Nationality Act; 8 C.F.R. Section 1240.26 (c). (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order

**APPENDIX B**

**8 U.S.C. Section 1254 (a) (1)**

(a) Granting of status

(1) In general- In the case of an alien who is a national of a foreign state
Designated under subsection (B) (or in the case of an alien having no nationality, is a person who last habitually resided in such a designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) May grant the alien temporary protected status in the United States and shall not remove the alien form the United States during the period which such status is in effect.

(b) Designations

(1) The Attorney General, after consultation with appropriate agencies of the Government may designate any foreign state (or any part of such foreign state) under this subsection only if-

(A) The Attorney General feels there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to that part of that state) would pose a serious threat to their personal safety.

**INA**
**Section 240**
**(e) Definition**
In this section and section 240 A:

**(1) Exceptional Circumstances**

The term "exceptional circumstances" refers to exceptional circumstances, (such as illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

APPENDIX D

**INA Section 244 (b) (2)**

"A brief, casual, and innocent departure from the U.S. that is not meaningfully disruptive does not break seven years continuous presence requirement."

**APPENDIX E**

**I67 Fed. Reg. 54, 878, 54 905 (August 26, 2002)**

**Single-Member Review and New Criteria for three-Member Panel Review**

Single member review is mandated for all casses Except those falling within one of the five enumerated categories:Those five categories include cases in which there is a need to:
(1) settle inconsistencies in the rulings of IJ's.
(2) clarify ambigueous laws, regulations or procedures; (3) correct an IJ's decision that does not comportwith the law; (4) resolve a case or controversy of "major national importance," or (5) correct a clearly erroneous factual determination by an IJ. Cases falling within one of these categories will be adjudicated by a three-Member panel.